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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1402

KEVIN JAMES KEKOA, *et al.*,
Petitioners,

vs.

WILLIAM S. RICHARDSON, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR RESPONDENT GEORGE T. H. PAI, ATTORNEY GENERAL OF THE STATE OF HAWAII, IN OPPOSITION

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ARGUMENT

The Petition for Writ of Certiorari presents no federal question of substance warranting further review, Rule 19 of this Court, and should be denied.

The material facts are simple and clearly bespeak the insubstantiality of Petitioners' contentions:

> By her will, Bernice Pauahi Bishop established a charitable trust for educational and other benevolent purposes. Mrs. Bishop died in 1884. With respect to the appointment of trustees, she provided in Article Fourteenth of her will as follows:
>
> "I further direct that the number of my said trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion."
>
> Trustee Herbert K. Keppeler died on March 18, 1971. In accordance with Article Fourteenth of Mrs. Bishop's will, on June 18, 1971 the Justices of the Supreme Court of Hawaii appointed Matsuo Takabuki to fill the vacancy. There has been no indication that Mr. Takabuki is not fully qualified to serve.

The Petitioners assert that the Justices should have held a public hearing before making the appointment,[1] and that in not doing so, they somehow violated the proscription in the Fourteenth Amendment to the U. S. Constitution that no State shall "deprive any person of life, liberty, or property, without due process of law."

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[1] Although the Justices declined to hold a public hearing, they did invite interested persons to submit suggestions as to qualifications which they believe a trustee should possess and names of persons whom they think are qualified to serve as trustee. (Petition, App. C, Ex. 3, p. 26c)

1. ***Petitioners Have Not Shown That They Have Been Deprived of Any Liberty or Property Within the Meaning of the Fourteenth Amendment.***

It is elementary that a deprivation of life, liberty or property must be shown before the due process clause of the Fourteenth Amendment may be invoked. Obviously no deprivation of life or liberty is involved. Petitioners claim deprivation of liberty and property, but nowhere do they specify such "liberty" or "property". See the opinion of the Supreme Court of Hawaii. (Petition, App. B, p. 6b) Petitioners do speak of having been denied "the liberty of any common citizen: the right to participate in the deliberations that affect him". (Petition, 18)

However, in the very next paragraph they contradict this by acknowledging that: "Petitioners, be it understood, do not contend that due process is denied whenever a trustee is appointed without affording interested parties, including beneficiaries, an opportunity to be heard". (Petition, 19)

Moreover, Petitioners confuse the "process" for the right which is being protected. Participation in deliberations is procedural. It is not a right, the deprivation of which can be accomplished only by according due process. Petitioners are placing the proverbial cart before the horse.

The same is true of Petitioners' further "narrower" contention that "whenever the Supreme Court of a state is involved in the appointment procedure, considerations of fundamental fairness and due process require that it adhere to standards applicable to any other court, or coordinate branch of government: that it afford interested parties the opportunity to be heard before it takes action" and that such action be subject to review in a court of equity. (Petition, 19) This contention is faulty on several counts:

(1) As stated above, it confuses the "process" for the right;

(2) It simply is not true that the Constitution requires that a court or agency of any coordinate branch of government hold a hearing before it makes an appointment. Presidents, governors, mayors and others in the executive and legislative branches appoint numerous persons to fill important public positions. Courts appoint masters, referees, administrators and other officers. We have not found any constitutional requirement, and Petitioners can cite none, of a public hearing as a prerequisite to appointment; and

(3) With respect to review by a court of equity of the appointment of a trustee, if Petitioners are contending that a court of equity may substitute its judgment for that of the Justices as to the worthiness or fitness of an appointee, Petitioners would be rewriting Mrs. Bishop's will and contravening her specific intent that the *Justices* fill the vacancy.

The only other reference to a right of which they are allegedly being deprived is a casual off-hand reference to "the obvious equitable interests that the beneficiaries have in a trust (i.e., a property interest)". (Petition, 18) In this connection, it should be noted that a charitable trust by its nature has beneficiaries who are not definite and ascertainable, 4 Scott, *Trusts* (2d ed. 1956), sec. 364. Here, the number of current and potential beneficiaries is enormous, and the views of a beneficiary or a potential beneficiary may not be the same as that of other beneficiaries or potential beneficiaries. For these, as well as historical, reasons, it is well-established that the Attorney General, as *parens patriae,* is the proper party to bring action to enforce a charitable trust. Bogert, *Trust and Trustees* (2d ed.), sec. 414, p. 340.

In this instance, the Attorney General of the State of Hawaii had been requested to consider contentions of the type raised by Petitioners but had found no evidence that the appointment procedure was faulty or that the candidate was not qualified. Accordingly, he declined to interfere with

the exercise of the power of appointment by the Justices. (Petition, 6)

Finally, Petitioners concede that authority in support of their extraordinary contentions "is not to be found in the reports of cases" and are constrained to acknowledge that "[n]o amount of sophisticated analysis will reveal the 'liberty' or 'property' which has been denied to Petitioners . . ." (Petition, 20) We agree that their contentions are without merit.

2. *The Appointment of a Successor Trustee for the Bishop Estate Did Not Constitute State Action.*

Petitioners' failure to show that they had been deprived of liberty or property within the meaning of the Fourteenth Amendment renders immaterial the question of whether or not State action was involved. Nonetheless, we shall address ourselves to this question since Petitioners have placed so much emphasis on it.

The injunction of the Fourteenth Amendment is directed against State action. In *Estate of Bishop,* 23 Haw. 575, 581-82 (1917), *aff'd,* 250 F 145, 149-50 (9th Cir. 1918), Article Fourteenth of Mrs. Bishop's will was authoritatively interpreted as delegating the power of appointment to the Justices not as a court, but as individuals. See *Estate of Carter,* 24 Haw. 536, 538-39; *Kekoa* v. *Supreme Court of Hawaii,* ——— Haw. ———. (Petition, App. B) None of the State-action cases cited by Petitioners is apposite.

There being no State action, the Fourteenth Amendment does not apply. Moreover, even if the trustee selection process were to be regarded as State action, the Fourteenth Amendment has not been violated because, as explained above, Petitioners have not been deprived of life, liberty or property.

3. *Petitioners Have No Constitutional Right to Designation of Substitute Justices by Lot.*

Petitioners' contention that failure of the Chief Justice to designate substitute Justices by lot denied Petitioners due process is clearly without merit. The Chief Justice and associate Justices of the State Supreme Court properly recused themselves. The Chief Justice then assigned judges of the State circuit courts to serve as substitute Justices, in accordance with the sole procedure prescribed therefor by the Hawaii State Constitution, Article V, section 2. Clearly, Respondents have no constitutional right to have substitute Justices selected by lot.

There has been no showing that the manner of assignment of substitute Justices was improper or that the substitute Justices were biased. On the contrary, they issued a carefully reasoned, thorough and scholarly opinion. The opinion clearly reveals the lack of merit in Petitioners' position. It also shows the absence of any substantial federal question warranting further review. (See Petition, App. B)

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

DATED: Honolulu, Hawaii, April 18, 1974.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Brief in Opposition were served upon EDWARD C. KEMPER, Suite 1401, 841 Bishop Street, Honolulu, Hawaii 96813, attorney for Petitioners, by mailing the same to him postage prepaid, this date. Three copies each of this Brief were also mailed to WALTER G. CHUCK, Suite 202, 1022 Bethel Street, Honolulu, Hawaii 96813, attorney for Respondents Richardson, Marumoto, Abe, Levinson and Kobayashi, and J. GARNER ANTHONY, 9th Floor, 333 Queen Street, Honolulu, Hawaii 96813, attorney for the Respondent Trustees of the Bernice P. Bishop Estate.

Honolulu, Hawaii, April 18, 1974.

BERTRAM T. KANBARA
Special Deputy Attorney General

Attorney for Respondent
George T. H. Pai
Attorney General of the
State of Hawaii

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QUESTIONS PRESENTED

I

Whether Petitioners are beneficiaries of the Bishop Estate and thus have standing to Petition for a Writ of Certiorari to review the appointment of a successor trustee to the Bishop Estate?

II

Whether Petitioners have any liberty or property which has been deprived within the meaning of the due process clause of the Fourteenth Amendment?

III

Whether the appointment process of successor trustees to the Bishop Estate constitutes state action?

IV

Whether the Chief Justice's appointment of substitute Justices from among the State's circuit court judges under the sole procedure provided by the Hawaii State Constitution violated Petitioners' right to due process under the Fourteenth Amendment?

COUNTER-STATEMENT OF FACTS

By her will, Bernice Pauahi Bishop (hereinafter "Mrs. Bishop") who died in 1884, created a charitable trust (hereinafter "Bishop Estate") out of the remainder of her estate "to erect and maintain in the Hawaiian Islands two schools, . . . one for boys and one for girls, to be known as the Kamehameha Schools."

The Bishop Estate's annual income was to be used to maintain the schools. A portion of each year's annual income, the amount of which was in the trustees' sole and full

discretion, was to be devoted to the "support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood."

Successor trustees to the Bishop Estate were to be appointed "by the choice of a majority of the Justices of the Supreme Court." On March 18, 1971, Herbert K. Keppler, a Bishop Estate trustee, died. On June 18, 1971, the Justices of the Supreme Court of Hawaii appointed Matsuo Takabuki (hereinafter "Mr. Takabuki") to fill the vacancy created by Mr. Keppler's death.

Petitioners, proclaiming themselves to be beneficiaries of the Bishop Estate, instituted suit to void Mr. Takabuki's appointment or to cause a master to be appointed to investigate the appointment. Petitioners asserted, among other things, that the appointment process violated the due process clause of the Fourteenth Amendment to the United States Constitution because the appointment process fails to provide notice and an opportunity to be heard to interested parties. Although the Complaint and Amended Complaint filed by Petitioners questioned Mr. Takabuki's qualifications to serve, Petitioners, in response to the communications from the Chief Justice and from the Attorney General, (Exhibits "3" and "11" to Appendix "C") have failed to submit any evidence indicating that Mr. Takabuki is not qualified to serve as a Bishop Estate trustee.

ARGUMENT

Respondents join in the Brief in Opposition filed for the Respondent George T. H. Pai, Attorney General of the State of Hawaii, and hence will discuss only questions I and III under the Questions Presented for Review.

Respondents' Brief in Opposition will not discuss all of the points covered in the Petition, but will only cover those points which relate or involve certain local matters. Respondents at this time will not discuss the decisions of the Su-

preme Court of the United States raised in the Petition because this Court is undoubtedly aware of those decisions and their inapplicability to the facts and circumstances of this case. Silence as to other points should not be construed as an assent to the other issues raised by the Petition.

I. This Court Should Not Grant the Petition to Resolve the Local Issue of Whether Petitioners Have Standing to Review the Appointment of Successor Trustees to the Bishop Estate.

Petitioners state that they are the beneficiaries and potential beneficiaries of the Bishop Estate. Such a conclusory assumption ignores a basic and yet unresolved question as to who is a beneficiary of the Bishop Estate with the right to institute litigation.

By definition, a charitable trust lacks definite and ascertainable beneficiaries. Thus, the Attorney General, the representative of the people, is charged with the responsibility for the enforcement and supervision of charitable trusts. 4 Bogert, *Trusts & Trustees* (2d ed.), §414. In certain factual circumstances, persons with a "special interest" have been granted standing to enforce a charitable trust. *Bogert, id.* In New Jersey, the inadequate enforcement and supervision of charitable trusts by the Attorney General as a matter of public policy led the court to liberalize its standing requirements with respect to the enforcement of charitable trusts. *City of Palerson v. Palerson General Hospital,* 97 N.J. Super 514, 235 A.2d 487 (1967).

This Court should not resolve the local issue of whether the Petitioners have a "special interest" in the Bishop Estate or whether the enforcement and supervision of the Bishop Estate by the Attorney General in Hawaii is inadequate.[1] The issue of Petitioners' standing to litigate the appointment of a successor trustee to the Bishop Estate is and should remain a matter for resolution by the appropriate state court.

---

[1] This is particularly true since Petitioners declined to submit any evidence to the Attorney General indicating that Mr. Takabuki was not qualified to be a successor trustee.

III. The Appointment of Successor Trustees to the Bishop Estate Does Not Involve State Action.

A. *Section 554-1 Hawaii Revised Statutes.*

The Petition argues that the Justices are acting in their capacity as the Supreme Court of the State of Hawaii in appointing successor Bishop Estate trustees because under *Estate of Bishop,* 23 Haw 575, (1917), *aff'd.,* 250 F. 145 (9th Cir. 1918) the circuit court judge does not have the authority which he would otherwise possess under §554-1 *H.R.S.* to refuse to enter an order vesting title to the trust property in the name of all the trustees, including the newly appointed trustees.

Petitioners mis-construe §554-1 *H.R.S.*

Statutes like §554-1 *H.R.S.* were not designed nor enacted to grant a court of equity discretionary authority to refuse to confirm or to remove a lawfully appointed trustee. Equity courts, because they acted in personam, had no direct means of vesting legal title to the trust property in the successor trustee. A court of equity could only order the remaining trustees to convey the trust property to the new trustee and punish the remaining trustees if they failed to comply. If there were no remaining trustees or if the remaining trustees had a legal disability like insanity, further difficulties in vesting title to the successor trustee were encountered. Statutes like §554-1 *H.R.S.* were designed to remove these kinds of difficulty and inconvenience of vesting title to the trust property in the successor trustee by providing that the court may by its own decree vest legal title to the trust property in the successor trustee. See 2 *Scott on Trusts* (3d ed.) §110.

The words "may make a vesting order" in §554-1 *H.R.S.* were not intended and do not grant discretionary authority to the circuit judge to choose or refuse to approve the newly appointed trustee, but only to prevent the statutory interpretation that other methods of vesting legal title to the trust property in the new trustee were repealed by impli-

cation by the enactment of §554-1 *H.R.S.* This is particularly true since §554-1 *H.R.S.* relates only to trust property situate within the State of Hawaii. Thus, if the trust owned property situate both within and outside of the State of Hawaii, the circuit judge may order the remaining trustees to convey legal title to the new trustee rather than entering a vesting order under §554-1 *H.R.S.* which would include only the trust property situate within the State of Hawaii.

The Petition not only misconstrues §554-1 *H.R.S.*, but also misstates the holding in *Estate of Bishop, supra.* In *Estate of Bishop,* 23 Hawaii 575, 583, the Supreme Court of the State of Hawaii held that the circuit judge did not have the discretionary authority to refuse to confirm the appointment of a successor trustee to the Bishop Estate because Mrs. Bishop's Will did not make the appointment subject to his approval or consent, and not because the appointment of a successor trustee is a judicial act of the Hawaii Supreme Court as stated in the Petition. This holding is consistent with the general trust law that the court lacks discretionary authority to prevent, modify or substitute the settlor of a trust's manner of appointing successor trustees. See 2 *Scott on Trusts* (3rd ed.), §§108.2, 108.3; 5 Bogert, *Trusts & Trustees* (2d ed.), §532; *Raffety v. Parker,* 24 1F.2d 594, 611-612 (8th Cir. 1957); and *In Re Estate of Beckwith v. Cooper,* 258 Ill. App. 411, 417 (1930).

B. *The fact that the individuals appointing successor trustees are Justices of the Supreme Court of the State of Hawaii does not make appointing act state action.*

Petitioners argue at great length that the appointors of successor trustees to the Bishop Estate are identified only by their state position and that they serve as appointors only while they occupy that state office.

Reflection reveals that the only manner that Mrs. Bishop could identify the "individuals" that she desired to appoint successor trustees to the Bishop Estate was by identifying

the offices and positions that were held by the individuals. The Bishop Estate was intended by Mrs. Bishop to endure into perpetuity and not to terminate within the lives of those individuals whom she knew and could identify by surname. Thus, Mrs. Bishop had no alternative manner by which she could identify and describe those individuals she desired to appoint successor trustees except by their office and their respective positions in that office.

The fact that the Justices lose their power to select successor trustees upon termination of office is likewise not significant. If the power to appoint continued after the Justices left office, the power would terminate upon the demise of the individual Justices. However, if the power to appoint were granted to the individuals who occupy the office only while they occupy the judicial office, the appointive power continues until the office is abolished. Since Mrs. Bishop envisioned that the Bishop Estate continue in perpetuity, she wanted the appointive power to likewise continue in perpetuity and not die with the individual named Justice possessing the same.

C. *Appointive document not determinant of state action.*

The Petition stresses several times that the document appointing Mr. Takabuki trustee is in the form of a court order, is impressed with the court's seal, is stamp filed by the clerk of the Supreme Court, and is retained in the files of the Supreme Court.

These incidents are argued to give the appearance that a state act has occurred in the appointment of a successor trustee to the Bishop Estate. These very same incidents are, however, necessary evidence that the proper persons under Mrs. Bishop's Will appointed the successor trustee.

Petitioners' arguments on this point lack merit for another reason. The substantive appointive act would not be changed by the removal and discontinuance of these prac-

tices, and the decision as to whether the appointment process is a state act should not depend upon such a transparent legal basis.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

DATED: Honolulu, Hawaii, May 17, 1974.

Respectfully submitted,

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the Supreme Court of Hawaii.